Pook Li Ping v Mahkamah Perusahaan Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R1–25–175 OF 2010
AZIAH ALI J
11 FEBRUARY 2011

Administrative Law — Judicial review — Findings of facts of Industrial Court based on credibility of witnesses — Whether termination decision was within functions of Industrial Court

Administrative Law — Remedies — Certiorari — Application for certiorari to quash award of Industrial Court — Failure of Industrial Court to consider relevant matters — Whether Industrial Court to consider relevant matters — Whether Industrial Court had considered background facts in total before making award

The appellant was on 26 February 1996 employed by the second respondent, a member of LexisNexis Group, as a Commercial Manager. Subsequently, the appellant was promoted as Commercial Director to manage, direct and coordinate the commercial and finance functions of the second respondent spanning across India, Hong Kong, Malaysia and India. However, several months later the appellant proposed to the managing director of the second respondent to review of her workload to enable the appellant to contribute to the second respondent. The appellant argued that without the daily operational issues to look at she would be able to focus effectively to work in India. More than a year later the second respondent informed that due to challenging business environment changes would be made affecting all including the appellant's job. After several impending reorganisation in updates in Asia Business Review the appellant was given a notice of termination of employment on 26 February 2003 with one month notice by the second respondent. The appellant was given redundancy benefits payment in accordance to the terms and conditions of the appellant's letter of employment. The appellant was earning RM17,136 per month at the time of her termination. The applicant argued that the bona fide actions of the second respondent's and conduct were questionable when the second respondent failed to inform earlier to the applicant of the job restructuring and the implementation of the restructuring without prior consultation with the appellant. The Industrial Court did not find evidence of mala fide in the appellant's retrenchment and decided that the second respondent was not obliged to offer any alternative employment to the appellant. The appellant submitted, inter alia; (i) that the Industrial Court had failed to consider relevant matters in finding that the second respondent's action was bona fide,

(ii) that the appellant had specific skills and expertise to be offered alternative position by the second respondent. This is an application for judicial review under O 53 of the Rules of the High Court 1980 for an order of certiorari to quash the award by the Industrial Court dismissing the applicant's claim for unfair dismissal.

Held, dismissing the application with costs:

(1) Upon considering the background facts in total, the second respondent had discharged the burden of proof that there existed a situation, which supports the retrenchment of the appellant. The review and reorganisation exercise executed by the second respondent involving the appellant was not carried out with the ulterior motive of driving the appellant out of her employment. All employees of the second respondent were notified to expect the review of their jobs. It was for the management to decide the strength of its staff, which it considered necessary for efficiency in its undertaking. The contention that the second respondent was obliged to warn/consult the appellant and offer the appellant suitable alternative employment was devoid of merit (see paras 18–19); *Tuan Syed Hashim bin Tuan Long v Esso Production Malaysia Inc* [1998] 5 MLJ 535.

(2) The Industrial Court has asked itself the correct questions in making its finding that the termination of the appellant was for just cause or excuse. The Industrial Court did not commit errors of law for failing to consider relevant and crucial matters in making its finding that the second respondent act was bona fide. The Industrial Court has considered relevant matters and has not considered irrelevant matters. The Industrial Court acceptance of the second respondent's witnesses and the reasons for the termination of the appellant was within the ambit of the Industrial Court's function. It is not the function of the High Court to weigh and assess the evidence of the witnesses. The decision of the Industrial Court does not suffer from the infirmities of illegality, irrationality or procedural impropriety to merit curial intervention (see para 20); *Menara Panglobal Sdn Bhd v Arokianathan a/l Sivapiragasam* [2006] 3 MLJ 493.

[Bahasa Malaysia summary

Perayu pada 26 Februari 1996 telah dilantik oleh responden kedua, ahli lembaga LexisNexis, sebagai pengurus komersial. Selanjutnya, perayu telah dinaikkan pangkat kepada pengarah komersial untuk menguruskan, mengarah dan menyelaraskan fungsi komersial dan kewangan responden kedua menjangkaui India, Hong Kong, Malaysia dan India. Walau bagaimanapun, beberapa bulan kemudian, perayu mencadangkan kepada pengarah urusan responden kedua untuk menyemak semula beban kerjanya untuk membolehkan perayu memberi sumbangan kepada responden kedua. Perayu

berhujah bahawa tanpa perlu melihat isu-isu operasi seharian dia boleh memberi tumpuan dengan efektif kepada kerja di India. Lebih daripada setahun kemudian responden kedua memberitahu bahawa disebabkan keadaan perniagaan yang mencabar perubahan akan dibuat yang akan memberi kesan terhadap semua termasuk pekerjaan perayu. Selepas beberapa penyusunan semula yang terjadi terhadap pengemaskinian dalam Asia Business Review perayu telah diberikan notis pemberhentian pekerjaan pada 26 Februari 2003 dengan notis sebulan oleh responden kedua. Perayu telah diberikan faedah-faedah pembayaran lebihan mengikut terma-terma dan syarat-syarat surat perlantikan perayu. Perayu menerima RM17,136 sebulan semasa pemberhentiannya. Pemohon berhujah bahawa tindakan-tindakan bona fide dan tingkah laku responden kedua dipersoalkan apabila responden kedua gagal untuk memberitahu pemohon terlebih dahulu tentang penyusunan semula pekerjaan dan pelaksanaan penyusunan semula tersebut tanpa berunding dengan perayu terlebih dahulu. Mahkamah Perusahaan tidak mendapat sebarang keterangan mala fide dalam pemberhentian perayu dan memutuskan bahawa responden kedua tidak berkewajipan untuk menawar sebarang alternatif pekerjaan kepada perayu. Perayu berhujah bahawa antara lain: (i) bahawa Mahkamah Perusahaan telah gagal untuk mempertimbangkan perkara-perkara relevan dengan dapatan bahawa tindakan responden kedua adalah bona fide; (ii) bahawa perayu mempunyai kemahiran dan kepakaran spesifik untuk ditawarkan jawatan alternatif oleh responden kedua. Ini merupakan permohonan untuk semakan kehakiman di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk perintah *certiorari* untuk membatalkan award oleh Mahkamah Perusahaan yang telah menolak tuntutan pemohon untuk pemecatan tidak adil.

Diputuskan, menolak permohonan dengan kos:

(1) Setelah mempertimbangkan fakta latar belakang secara keseluruhannya, responden kedua telah berjaya membuktikan bahawa telah wujud situasi, yang mana menyokong pemberhentian perayu. Perlaksanaan semakan dan penyusunan semula yang dijalankan oleh responden kedua yang melibatkan perayu tidak dilakukan dengan motif terselindung untuk menyebabkan perayu tidak mempunyai pekerjaan. Kesemua pekerja responden kedua telah diberitahu untuk menjangka penyemakan pekerjaan mereka. Ia adalah bagi pihak pengurusan untuk memutuskan keupayaan kakitangannya, yang mana ia menganggap perlu bagi kecekapan dalam menjalankan tugasnya. Hujahan bahawa responden kedua hendaklah memberi amaran/berunding dengan perayu dan menawarkan perayu pekerjaan alternatif yang bersesuaian tidak mempunyai merit (lihat perenggan 18–19); *Tuan Syed Hashim bin Tuan Long v Esso Production Malaysia Inc* [1998] 5 MLJ 535.

(2) Mahkamah Perusahaan telah mempersoalkan soalan-soalan yang betul dalam membuat dapatan bahawa pemberhentian perayu adalah dengan

sebab atau alasan munasabah. Mahkamah Perusahaan tidak melakukan kesilapan undang-undang kerana gagal untuk mempertimbangkan perkara relevan dan penting dalam membuat dapatannya bahawa responden kedua adalah *bona fide*. Mahkamah Perusahaan telah mempertimbangkan perkara-perkara relevan dan tidak mempertimbangkan perkara yang tidak relevan. Penerimaan saksi-saksi responden kedua oleh Mahkamah Perusahaan dan sebab-sebab untuk pemberhentian perayu adalah dalam lingkungan fungsi Mahkamah Perusahaan. Ia bukanlah fungsi Mahkamah Tinggi untuk menimbang dan menilai keterangan saksi-saksi. Keputusan oleh Mahkamah Perusahaan tidak terjejas oleh kepenyalahan undang-undang, keadaan tidak rasional atau prosedur yang tidak betul yang memberi merit untuk campur tangan yang penting (lihat perenggan 20); *Menara Panglobal Sdn Bhd v Arokianathan a/l Sivapiragasam* [2006] 3 MLJ 493.]

Notes

For cases on certiorari, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 330–606.

For cases on judicial review in general, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 249–308.

Cases referred to

Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417; [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159, SC (refd)

Jye Tai Precision Industrial (M) Sdn Bhd v Victoria Arulsamy [2008] 2 MLJ 57; [2008] 1 CLJ 760, CA (refd)

Menara Panglobal Sdn Bhd v Arokianathan a/l Sivapiragasam [2006] 3 MLJ 493; [2006] 2 CLJ 501, CA (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)

Steve LK Shim in Firex Sdn Bhd v Ng Shoo Waa [1990] 1 ILR (Rep) 292, IC (refd)

Tuan Syed Hashim bin Tuan Long v Esso Production Malaysia inc [1998] 5 MLJ 535, HC (refd)

William Jacks & Co (M) Sdn Bhd v S Balasingam [2000] 7 MLJ 1; [1997] 3 CLJ 235, CA (refd)

Legislation referred to

Rules of the High Court 1980 O 53

Sunil Vijayan (The Chambers of Sunil Vijayan) for the applicant.
T Thavalingam (Lee Hishamuddin Allen & Gledhill) for the second respondent.

Aziah Ali J:

[1] This is an application for judicial review under O 53 of the Rules of the High Court 1980 for an order of certiorari to quash the award by the Industrial Court No 312 of 2010 dated 10 March 2010 dismissing the applicant's claim of unfair dismissal. I dismissed the application with costs of RM3,000 to the second respondent.

BACKGROUND

[2] The applicant, an accounting graduate, commenced employment with the second respondent on 26 February 1996 as commercial manager (exh PLP1). The second respondent is a member of the LexisNexis Group. With effect from 1 October 1999 the applicant was promoted to commercial director, Asia to manage, direct and coordinate the commercial and finance functions of the business across the second respondent's business in India, Hong Kong, Malaysia and Singapore. The key functional areas the applicant was responsible for are:

(a) finance, accounting, audit and corporate governance;

(b) customer service, fulfillment and distribution; and

(c) IT and business information systems.

[3] As commercial director the applicant was required to work closely with the regional director to carry out strategic planning in relation to all aspects of operations required to support the rapid growth of the business in Asia which includes:

(a) identifying and implementing opportunities to streamline and optimise operations regionally;

(b) the ongoing development of strong information systems, including assisting in the implementation of e-commerce strategies for the business;

(c) all round responsibility for statutory, financial and management reporting, corporate governance and maintenance and development of corporate procedure and policies;

(d) coordinating the planning, forecasting and budgeting process;

(e) liasing with the RES Corporate office in Singapore as relevant; and

(f) working on acquisitions and related business development projects as they arise.

[4] On 31 March 2001 the applicant sent an email to the then managing director to propose a review of her workload as her workload had been extended to cover Nexis, another company within the LexisNexis group of companies. In order to be able to cope with the additional workload and be able to contribute effectively to the business, the applicant proposed that fulfillment and warehouse functions report to some other person 'due to the constant need to ensure that it works smoothly and the constant need to ensure that the gaps in the system or work flow is rectified'. The applicant further proposed amongst others one staff to handle financial and management once the restructuring of the finance functions has stabilised and another staff to manage the commercial system and develop new areas of applications, trouble shoot all issues that users have, train new users etc, but she would continue to undertake the integration of new acquisitions encompassing Nexis new expansion as her forte is in the area of problem solving, analysis and operations as well. Once these stabilised, the applicant proposed that the financial function be passed to someone else so that she would get the hands on opportunity to learn about the business. According to the applicant without the daily operational issues to look at, she would be able to focus more on India.

[5] On 3 September 2002 by way of a letter issued by the CEO LexisNexis Asia Pacific, the second respondent announced 'a major change program that impacts all aspects of our business in Asia'. According to the letter the business faced a challenging environment in Asia. Whilst the region has vital and promising markets for their current and future growth plans, Asia is experiencing tough economic conditions. The overall financial results for the year in Asia have been very disappointing and the business is well below the targets set. It was therefore decided what is described as a 'strategic organisational and financial review of our Asia businesses to identify where and how we can improve and invest'.

[6] In a 'Questions & Answers — Asia Business Review' dated 3 September 2002 it is stated as follows:

Q: Will people lose their jobs as part of this Review?

A: There is a possibility that the review may result in some new positions being created, some positions being re-aligned, and some positions not being relevant anymore. We will only be able to provide more information when the review is complete. To reiterate, we are guided by our core values in all actions towards our employees, customers and shareholders.

Q: Is LexisNexis Asia in financial difficulty?

A: No, the company is not in financial difficulty and is certainly NOT going out of business. However, we are not meeting the targets we set for ourselves.

It is further stated that the review is designed to help the business get into better

shape not only for current challenges but to also take better advantage of the opportunities in the market and achieve aggressive growth objectives. The letter also announced the departure of the Managing Director of Asia and the members of the Steering Committee. The applicant's reporting line was changed to the Chief Financial Officer-Asia Pacific ('CFO').

[7] On 18 October 2002 the second respondent's CEO Asia-Pacific issued a letter to update the Asia Business Review. The letter announced the appointment on one Tan Chee Kiat as Asia Business Review consultant to provide financial, strategic and organisational analysis and the appointment of one Mahabeer Singh, HR Manager. According to the letter, from the CEO's visits to Japan and India and telephone conferences with the teams in Beijing and Taipei, one theme that kept emerging was that the business is most successful where it has dedicated teams focusing intently on a market. In the 'Asia Business Review — Team Updates' dated 18 October 2002 the applicant was appointed to the steering committee for finance, fulfilment, manufacturing, distribution and facilities headed by the CFO-Asia Pacific. Another member was Tan Chee Kiat.

[8] By a letter dated 1 November 2002 the CEO announced a change in the leadership team. According to the CEO, a country leader must own the responsibility to build a stronger ownership in individual countries to drive revenue and strategies for key customer segments with input and collaboration of the editorial, sales, marketing and EPD teams. Thus it would be redundant to have a regional publishing organisation with the same primary responsibility. Pursuant to this the CEO eliminated the position of regional publishing director and announced the departure of Conita Leung who held the role as coordinator of the editorial and publishing review team. It was also announced that Tan Chee Kiat would lead a new cross-functional team that will focus on developing a plan to enhance the financial and reporting systems.

[9] By a 'CEO Update — Asia Business Review' dated 31 December 2002 the CEO states amongst others as follows:

> Regarding jobs, please recall that two management positions have already been discontinued and some new roles have been announced. Based upon the work you have been doing on the review teams and your many recommendations, you should reasonably expect that a number of additional positions will be created or re-aligned and some additional positions will be discontinued. I will communicate more about changes in this regard at the end of the current phase and as you complete the work on your review teams and make your additional recommendations.

On 25 February 2003 the CFO sent an email to the applicant requesting to meet her on 26 February 2003. The applicant received a notice of termination of employment dated 26 February 2003 giving the applicant one months'

notice of termination of employment in accordance with the terms and conditions of her letter of offer of employment. Her last day of service with the second respondent would be 26 March 2003. She was also informed that she would be paid redundancy benefits. At the time of the applicant's termination she was earning RM17,136 per month.

[10] On 27 February 2003 the second respondent issued a memo which announced changes to the business structure. The memo states amongst others that some activities will be reorganised or realigned to enhance our customer focus and improve accountability. It was therefore decided to:

(a) split the sales and marketing organisation; and

(b) divide the sales organisation into two teams, North Asia and South Asia.

It is stated that in consultation with the Asia Pacific CFO the role of commercial director, which requires management of finance, accounting, customer service, IT, warehousing, fulfillment, distribution, inventory control and financial systems, be eliminated. It is stated further:

> We believe the best way for us to move forward is to have a Finance Director focused intently only on our accounting and finance activities. We are pleased to announce the appointment of Tan Chee Kiat as Finance Director. He will be based in Singapore and will report to Jim Conybeare-Cross. We are also pleased to announce that Suzanne Narayanan will be joining us in early March as our new Finance Manager. Suzanne will be based in Malaysia and will report to Chee Kiat. As we mentioned above, manufacturing/print production, warehousing, distribution and inventory control will now fall under the Logistics team. The customer service and order processing teams will now be part of the Sales Operations organisation. IT responsibilities will all move under the Asia Pacific EPD/IT team and ERP support will be consolidated in Australia.

[11] The second respondent contends that the position of the commercial director became surplus. The applicant contends that she was not redundant as she was not considered for and/or not offered alternative positions within the company and/or group. It is further contended that the purported review/restructuring was merely a pretext for the second respondent to get rid of employees it no longer wanted. Counsel submits that the Industrial Court erred in concluding that there is no legal obligation to consult or warn the applicant before retrenching her or to offer her alternative employment. It is contended that the applicant's termination was actuated by mala fide and intended to victimise the applicant, motivated by ulterior motive and constituted unfair labour practice. Therefore her termination was without just cause or excuse and she ought to be reinstated to such position as this court

deems fit without any loss of salary or other benefits.

THE AWARD

[12] The Industrial Court asked the following questions:

(a) whether the redundancy situation and consequent retrenchment was a colourable exercise to get rid of the employee; and

(b) whether the managerial power to retrench for redundancy was exercised bona fide or for collateral reasons.

The Industrial Court correctly stated that the burden of prove of redundancy lies on the employer.

[13] Upon an analysis of the totality of the evidence the Industrial Court found that the second respondent is entitled to organise its business in the manner it considers best and the second respondent had undergone reorganisation of its business in relation to the applicant's position in the company and the applicant's post has become redundant. The existence of a redundancy situation justifying the applicant's dismissal are based on the following grounds:

(a) the second respondent did not conduct the entire reorganisation for the purpose of displacing the applicant from her post;

(b) the post of finance director based in Singapore is to focus on finance, accounting and credit control and according to the evidence of the second respondent's witness COW2 it would entail a reduction in the scope of responsibilities as commercial director;

(c) the elimination of the applicant's post is evident from the second respondent's memo dated 27 February 2003;

(d) the applicant was fully aware of the business review undertaken and that certain job functions would be made redundant (evidence of COW1 and COW2);

(e) the applicant agreed that as early as September 2002 she was notified that some positions would no longer exist;

(f) the applicant agreed that as a result of the reorganisation her role as commercial director has been broken down into smaller roles; and

(g) the applicant agreed that the alternative positions of finance director and finance manager were smaller in roles and job responsibilities compared to the position of commercial director.

[14] With regard to the submissions by counsel for the applicant that the

bona fide of the second respondent's actions and conduct are questionable because the second respondent did not tell the applicant earlier when it could have, and the second respondent had not consulted the applicant about how her functions ought to be redistributed, the Industrial Court is of the view that the second respondent is entitled to retrench the applicant since it is its right to decide how best to run its business. The Industrial Court found not an iota of evidence to show mala fide regarding the retrenchment. The Industrial Court also found that there is no legal obligation on the second respondent to warn or consult the applicant before the retrenchment although it would be good practice. The Industrial Court held that the second respondent is not obliged to offer any alternative employment to the applicant.

[15] The Industrial Court made the following findings:

(a) the second respondent has discharged the burden of proof of the existence of a situation to justify the retrenchment of the applicant;

(b) the second respondent is entitled to retrench the applicant since it is its right to decide how best to run its business;

(c) the reorganisation of the second respondent's business was bona fide;

(d) there is not an iota of evidence to show mala fide regarding the retrenchment;

(e) there is no legal obligation on the second respondent to warn or consult the applicant before the retrenchment although it would be good practice;

(f) the second respondent is not obliged to offer any alternative employment to the applicant; and

(g) the retrenchment of the applicant is therefore justified.

Consequently the Industrial Court found that the dismissal of the applicant was for just cause or excuse.

[16] Counsel for the applicant submits that the Industrial Court has failed to consider relevant and crucial matters in making its finding that the second respondent's act is bona fide. It is submitted that there was never a surplus to justify the applicant's retrenchment. Counsel submits that the reasons given by the second respondent for not offering the two alternative positions to the applicant are insufficient and unacceptable when the applicant had the specific skills and expertise for both positions. Therefore it cannot be said that the applicant has become redundant at the point her position ceased to exist. It is submitted that the applicant therefore did not become surplus automatically

and her purported retrenchment is dismissal without just cause or excuse.

DECISION

[17] In the Court of Appeal case of *Jye Tai Precision Industrial (M) Sdn Bhd v Victoria Arulsamy* [2008] 2 MLJ 57; [2008] 1 CLJ 760 James Foong JCA (as His Lordship then was) referred to the principles of law in judicial review and referred to the judgment of Jemuri Serjan SCJ in *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417; [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 as follows:

> It seems to us that it should be treated as trite law that judicial review is not an appeal from a decision but a review of the manner in which the decision was made and the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable. There is no dearth of authorities on this proposition …
>
> … it is not the function of the High Court in exercise of its supervisory jurisdiction to hear a dispute 'de novo' and decide it on its merits.

His Lordship further referred to the case of *Menara Panglobal Sdn Bhd v Arokianathan a/l Sivapiragasam* [2006] 3 MLJ 493; [2006] 2 CLJ 501 wherein Mohd Ghazali Yusoff JCA (as His Lordship then was) said:

> … I would think that in dealing with judicial review a judge should have the following principles, inter alia, in the forefront of his mind:
>
> (a) judicial review is not an appeal from a decision but a review of the manner in which the decision was made;
>
> (b) the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable;
>
> (c) the High Court, through judicial review, should not introduce technicalities of the court of law to the Industrial Court; this would certainly be so as s 30(5) of the Act imposes a duty upon the Industrial Court to have regard to substantial merits of a case rather than to technicalities and it also requires the Industrial Court to decide a case in accordance with equity and good conscience;
>
> (d) the main and only function of the Industrial Court in dealing with a reference under s 20 of the Act is to determine whether the misconduct or irregularities complained of by the management as to the grounds of dismissal were in fact committed by the workman and if so, whether such grounds constitute just cause or excuse for the dismissal;
>
> (e) the Industrial Court should not be burdened with the technicalities regarding standard of proof, the rules of evidence and procedure that are applied in the court of law; and
>
> (f) the High Court will not interfere with finding of facts by the Industrial Court unless the same are completely unsupported by evidence and further, will not

> interfere merely because it may come to different conclusions on facts on the basis of the same evidence; weighing and assessing the evidence of the witnesses is the function of the Industrial Court and not that of the High Court.

The limited exceptions where the review extends to substance of the decision and not just the judicial making process covers situations where there is either illegality, irrationality and perhaps proportionality (see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147).

[18] The background facts narrated above considered in totality supports the finding of the Industrial Court that the second respondent has discharged the burden of proof that there existed a situation which supports the retrenchment of the applicant. There is sufficient evidence to show that the review and reorganisation exercise carried out by the second respondent in which the applicant was also involved was not carried out with the ulterior motive of driving the applicant out of her employment. All employees of the second respondent were notified to expect that the review may result in a number of additional positions created or realigned and some additional positions would be discontinued. It is for management to decide the strength of its staff which it considers necessary for efficiency in its undertaking (per Steve LK Shim in *Firex Sdn Bhd v Ng Shoo Waa* [1990] 1 ILR (Rep) 292). There is in evidence of at least two senior employees being terminated pursuant to the review exercise.

[19] Counsel for the applicant submits that the second respondent is obliged to warn and/or consult the applicant before retrenching her and to offer the applicant suitable alternative employment. From the evidence the alternative employment would be the post of finance director or finance manager. The evidence of the second respondent's witnesses that these two posts carried lesser roles and job responsibilities compared to the post of commercial director has not been challenged. I find the contention that the second respondent is obliged to warn/consult the applicant and to offer the applicant suitable alternative employment devoid of merit. In *Tuan Syed Hashim bin Tuan Long v Esso Production Malaysia Inc* [1998] 5 MLJ 535 Abdul Kadir Sulaiman J (as he then was) said:

> The company after all was not obliged to make any offer for any alternative employment on account of the exercise properly carried out. Further, it was not mala fide on the part of the respondent not to consult or discuss with the applicant its determination to re-organise its company.

In *Firex Sdn Bhd v Ng Shoo Waa* Steve LK Shim referred to *The Law of Industrial Disputes* (OP Malhotra) as follows:

For instance, retrenchment cannot be said to be unjustified merely for the reason that the employer could have transferred the workmen to another unit in any part of the country and the tribunal therefore, cannot infer that the failure of the employer to transfer the retrenched employees to other units renders the retrenchment unjustified.

[20] Having considered the award I agree with counsel for the second respondent that the Industrial Court has asked itself the correct questions in making its finding that the termination of the applicant was for just cause or excuse. I am unable to agree with counsel for the applicant that the Industrial Court has committed errors of law by failing to consider relevant and crucial matters in making its finding that the second respondent's act is bona fide. The Industrial Court has considered relevant matters and has not considered irrelevant matters. The Industrial Court accepted the evidence of the second respondent's witnesses and the reasons for the termination of the applicant. It is the function of the Industrial Court, not the High Court, to weigh and assess the evidence of witnesses (*Menara Panglobal Sdn Bhd v Arokianathan a/l Sivapiragasam*). The question at the end of the day is whether a reasonable tribunal similarly circumstanced would have come to a like decision on the facts before it (*William Jacks & Co (M) Sdn Bhd v S Balasingam* [2000] 7 MLJ 1; [1997] 3 CLJ 235). I find the decision of the Industrial Court does not suffer from the infirmities of illegality, irrationality or procedural impropriety to merit curial intervention. For the aforementioned reasons I dismissed the application with costs of RM3,000 to the second respondent.

Application dismissed with costs.

Reported by Masrifah Ravendran